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A FREE SPEECH RESPONSE TO THE GAY RIGHTS/RELIGIOUS LIBERTY CONFLICT

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ABSTRACT—The most sensible reconciliation of the tension between religious liberty and public accommodations law, in the recent cases involving merchants with religious objections to same-sex marriage, would permit business owners to present their views to the world, but forbid them either to threaten to discriminate or to treat any individual customer worse than others. Even if such businesses have no statutory right to refuse to facilitate ceremonies they regard as immoral, they are unlikely to be asked to participate in those ceremonies. This solution may, however, be forbidden by the law of hostile environment harassment. That raises a severe free speech problem, but the Supreme Court has left the pertinent doctrine in a state of confusion. I offer a better account of free speech law, one that depends on some neglected free speech values—the protection of religious disagreement, the promotion of mutual transparency among persons, and the positive valuation of ethical confrontation. I conclude that, under familiar rules of constitutional avoidance, state antidiscrimination laws should be construed to allow this kind of speech.

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INTRODUCTION

In 2012, a Chicago-based group, The Civil Rights Agenda, filed a human rights complaint against the Chick-fil-A restaurant chain, claiming that "the company's widely published corporate philosophy, culture, and policies" convey to homosexuals that they are unwelcome in its restaurants.[1] Chick-fil-A had contributed millions of dollars to organizations opposed to same-sex marriage.[2] The complaint cited statements by the company's Chief Operating Officer, Dan Cathy, that "[a]s an organization we operate on Biblical principles" and "[w]e are inviting God's judgment on our nation when we shake our fist at him and

[1] Charge of Discrimination, Zaharakis v. Chick-fil-A Rest., No. 2013CP0317 (Ill. Dep't of Human Rights, Aug. 2, 2012), http://volokh.com/wp-content/uploads/2012/08/ChickfilAComplaint.pdf [https://perma.cc/QDD8-VC6W]; *see also* David Badash, *BREAKING: Chick-Fil-A Gets Multiple Human Rights Act Complaints Filed Against Them*, NEW CIVIL RIGHTS MOVEMENT (Aug. 2, 2012, 11:02 AM), http://www.thenewcivilrightsmovement.com/breaking_chick_fil_a_gets_multiple_human_rights_act_complaints_filed_against_them [https://perma.cc/J8ZZ-DMMU].

[2] *Chick-fil-A Donated Nearly $2 Million to Anti-Gay Groups in 2010*, EQUALITY MATTERS (July 2, 2012, 9:26 AM), http://equalitymatters.org/factcheck/201207020001 [https://perma.cc/34KG-79GY].

say, 'We know better than you as to what constitutes a marriage.[']"[3] The complainant wrote: "As a result of the foregoing published statements regarding Chick-fil-A's corporate philosophy, culture and policies, as an unmarried homosexual in a 'non-traditional' family unit, I know that my family and I are looked down upon, loathed, unwelcome, objectionable and unacceptable to Chick-fil-A."[4] (As of this writing the complaint is still pending before the Illinois Department of Human Rights.[5])

The complaint had a reasonable basis in Illinois law, which declares that no "place of public accommodation" may "publish, circulate, [or] display" any communication "which the operator knows is to the effect that any of the facilities of the place of public accommodation will be denied to any person or that any person is unwelcome, objectionable or unacceptable because of unlawful discrimination."[6] Chick-fil-A's public statements of opposition to homosexuality have become so notorious that the company's name alone indicates such opposition. (At Northwestern University School of Law, catering by Chick-fil-A at a Federalist Society-sponsored event on same-sex marriage produced a bitter controversy.[7]) The complainant is probably sincere when he says that the well-known corporate policies of Chick-fil-A make him feel unwelcome there. If the law forbids any action by a public accommodation that makes some customers feel unwelcome, then his claim is meritorious.

You probably think that the complaint raises grave First Amendment problems.[8] Under present constitutional doctrine, it is not clear that it does.

The law of hostile environment harassment demands that no member of a protected class be treated worse than others—for example, by being

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[3] Charge of Discrimination, *Zaharakis*, No. 2013CP0317.

[4] *Id.*

[5] Telephone Interview with Jacob Meister, Chairman, The Civil Rights Agenda (June 2, 2016). The company has since stopped funding organizations opposed to gay rights. *Chick-fil-A Same-Sex Marriage Controversy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Chick-fil-A_same-sex_marriage_controversy [perma.cc/W6NR-FRJJ]. The company also may have been responding to statements by prominent politicians, notably the mayors of Chicago and Boston, that they would not allow franchises to open in their cities unless the company changed its policies. Denying permits because of disagreement with the applicant's political views is an obvious First Amendment violation and clearly would have been struck down if challenged, but there has been no litigation on this point.

[6] 775 ILL. COMP. STAT. 5/5-102 (2014).

[7] Staci Zaretsky & Joe Patrice, *Fed Soc Chapter Offers Chick-fil-A at Gay Marriage Event with Disastrous Results*, ABOVE THE LAW (Sept. 23, 2014, 11:38 AM), http://abovethelaw.com/2014/09/fedsoc-chapter-offers-chick-fil-a-at-gay-marriage-event-with-disastrous-results/ [perma.cc/BP6W-AA2E]. I was a participant in the event, commenting on a talk by Ryan Anderson, a prominent opponent of same-sex marriage.

[8] For a compilation of arguments that it does, see Doug Mataconis, *Civil Rights Group Alleges Discrimination by Chick-fil-A Because of Dan Cathy's Opinion*, OUTSIDE THE BELTWAY (Aug. 11, 2012), http://www.outsidethebeltway.com/civil-rights-group-alleges-discrimination-by-chick-fil-a-because-of-dan-cathys-opinion/ [perma.cc/HZY6-JK8J].

made to feel unwelcome—at a place of public accommodation. The law of free speech demands, or more precisely should demand, that the proprietor of that place of public accommodation have the right to share his thoughts with the world. These demands point in opposite directions, and doctrine must be constructed in a way that accommodates both. The Court has not done that. Instead, it has laid down two contradictory lines of pertinent law, and then has made matters worse by foreclosing any future reshaping of First Amendment law.

If the law of free speech protects anything, it should protect heretical speech—speech that dissents from dominant values. It is commonly thought that protection of political discussion is the central purpose of the Free Speech Clause. Dissenting religious speech is, however, the original, primitive core of free speech protection. The speech of Chick-fil-A is a specimen of that. The notions that same-sex relationships are immoral, and that same-sex marriage is intrinsically impossible—ideas that are generally based on religious beliefs[9]—are increasingly unpopular. Hostile environment law threatens to block business owners from communicating these views.

The most sensible reconciliation of the tension would permit business owners to present their views to the world, but forbid them either to threaten to discriminate or to treat any individual customer worse than others. The Court is unlikely to offer us anything like this. For decades it has shown no interest in the problem.[10] State courts, however, can accomplish the same result when they interpret their antidiscrimination statutes. The familiar rule of avoidance of constitutional difficulties supports that interpretation.

That could help solve the pressing problem of the collision, in public accommodations law,[11] between gay rights and conservative religion.[12] If proprietors who object to same-sex marriage could make their views known, then even if they have no statutory right to refuse to facilitate

[9] *See* Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx [perma.cc/2DDP-DC3X] (Americans who oppose same-sex marriage "are most likely to explain their position on the basis of religious beliefs and/or interpretation of biblical passages.").

[10] *See infra* text accompanying notes 13–21.

[11] I do not address the rather different issue of state officials who conscientiously object to facilitating same-sex marriage. *See, e.g.*, Ruth Colker, *Religious Accommodations for County Clerks?*, 76 OHIO ST. L.J. FURTHERMORE 87 (2015) (analyzing claims against Kentucky County Clerk Kim Davis).

[12] This is often described as a conflict between gay rights and religion. This is misleading, since every major religious denomination in the United States is split on this issue—part of a longstanding division in American religion between orthodox and progressive religiosity. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

ceremonies they regard as immoral, they are unlikely to be asked to participate in those ceremonies. On the contrary, same-sex couples will almost all want nothing to do with them. The conflict between the groups can be avoided to the extent that they are kept far apart from one another. Announcements of the proprietor's views will not absolutely guarantee that service will not be demanded, but it will make such demands rare. A high but less than perfect rate of success is all that can be demanded of any legal rule.

Both sides will have qualms about this proposal. Gay people reasonably fear a climate of pervasive hatred against them—many have a lot of personal experience of that—and conservative Christians reasonably fear threats and vandalism if they disclose their views. This is not a perfect solution. It is merely less bad than the alternatives.

It is also demanded by the First Amendment's protection of free speech. Any legitimate regime allows dissent, and a business owner's premises are usually the only medium by which she realistically can hope to broadcast her message.

Part I of this Article explains how the Court has left the question of free speech limits on hostile environment law in a state of confusion. Part II shows how this confusion stands in the way of a free speech-based solution to the conflict. Part III examines the Court's rigid, static understanding of the First Amendment, which impairs its capacity to devise sensible exceptions to free speech. Part IV considers some neglected free speech values—the protection of religious disagreement, the promotion of mutual transparency among persons, and the positive valuation of ethical confrontation—and shows their tension with the purposes of antidiscrimination law. Part V further explores that tension by examining one case, the Oregon litigation over a bakery's refusal to make a wedding cake for a same-sex couple. Part VI argues that state courts should construe their antidiscrimination statutes to permit businesses to make their objections to same-sex marriage known to the public—a step which is likely to keep almost all gay customers away and so prevent such cases from arising in the future. The Conclusion reflects on the interaction of free speech and toleration.

I. TWO (CONTRADICTORY) LEGAL OPINIONS ON FREE SPEECH AND HOSTILE ENVIRONMENT

There is, in principle, a deep tension between antidiscrimination law and free speech law. The prohibition of discrimination dictates that members of protected classes cannot be treated worse than others in the workplace, or in public accommodations. Hostile speech is one way of

treating a group worse than others. Yet such speech is defined by its viewpoint, and viewpoint-based restrictions on speech are almost always unconstitutional.

The Supreme Court has never acknowledged this tension. On the contrary, it has laid down two pertinent but contradictory lines of authority.

A. Hostile Environment Raises No Free Speech Issue

One group of cases indicates that antidiscrimination law raises no free speech issues at all. The free speech question was extensively briefed in *Harris v. Forklift Systems, Inc.*,[13] in which the Court upheld a harassment claim that was based largely on the male company president's constant sexual innuendo and sex-based ridicule of female employees. The Court made no mention of First Amendment limits in its opinion.[14] "After *Harris*," Professor Richard Fallon observed, "it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech."[15] Frederick Schauer interpreted the Court's silence as "saying, in as strong a way as it could, that the defendant's First Amendment arguments were so trivial that they did not even deserve a mention in the *United States Reports*."[16]

A year earlier, the Court had offered a partial explanation of its refusal to protect certain harassing speech. It declared that restriction of speech on the basis of its content is permissible when "a particular content-based subcategory of a proscribable class of speech" is "swept up incidentally within the reach of a statute directed at conduct rather than speech . . . . Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."[17]

This is not a satisfactory explanation. Hostile environment law targets much more than "a particular content-based subcategory of a proscribable class of speech."[18] The company president's actionable statements in *Harris*, such as "You're a woman, what do you know" and "We need a

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[13] 510 U.S. 17, 19–21 (1993).

[14] *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 7–10.

[15] *Id.* at 9. For a similar reading of *Harris*, see KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 82 (1995).

[16] Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 356 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

[17] R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991) (plurality opinion)).

[18] *Id.*

man as the rental manager,"[19] are not fighting words or any other type of proscribable speech. If, on the other hand, *otherwise protected* speech were regulable whenever it were "swept up incidentally within the reach of a statute directed at conduct rather than speech,"[20] then there would be no constitutional difficulty with the suit against Chick-fil-A. The Illinois law does not target speech. The Court, however, has since made clear that even if a law "may be described as directed at conduct," it will be subject to strict scrutiny if "as applied . . . the conduct triggering coverage under the statute consists of communicating a message."[21]

And that is it. That is all that the Court has said specifically about free speech limits on harassment law. The Court has never been confronted with a speech restriction as egregious as that proposed in the Illinois case, but its minimalist treatment of the harassment question implies that there is no constitutional problem with any application of harassment law. That is how it has been read by lower courts, which have summarily dismissed free speech defenses to harassment claims.[22]

Thus far, this silence has not been much of a problem. As a general matter, in employment law, the prohibition of hostile environment harassment is amply justified, despite the burden on speech. Women are far more likely to be sexually harassed in male-dominated occupations, and women in nontraditional jobs quit because of sexual harassment at least twice as often as women in traditional jobs.[23] If verbal workplace harassment were fully protected speech[24]—if, for example, pornographic photographs of women, or racist slogans, could be freely posted—then some workplaces would remain segregated, and the purposes of antidiscrimination law would be thwarted.[25]

This logic, however, doesn't easily transpose into public accommodations.[26] No one's opportunities are likely to be significantly

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[19] Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993).

[20] *R.A.V.*, 505 U.S. at 389.

[21] Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

[22] *See* Henderson v. City of Murfreesboro, 960 F. Supp. 1292, 1299 n.10 (M.D. Tenn. 1997) ("[T]he majority of courts have essentially ignored the conflict between free expression and Title VII."); Fallon, *supra* note 14, at 7–10; Schauer, *supra* note 16, at 356.

[23] Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1834 & n.328 (1990).

[24] This was advocated by Kingsley R. Browne, *Title VII as Censorship*: *Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 545–46 (1991).

[25] *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 248–54 (1996).

[26] Many defenses of hostile environment restrictions on speech are specific to the workplace. *See, e.g.*, J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*,

restricted by public accommodations that are less welcoming of some groups than others.[27] (That might have been the case in the Deep South in 1964, but it is not likely to be so anywhere now.) If the extension of hostile environment law to public accommodations has been a mistake, it is a minor one. The costs of the error have thus far been low. A very thorough survey of hostile environment public accommodations law discovered only a few cases in which anything more than direct harassment of an individual was involved.[28]

There have been a few ugly episodes of indefensible speech. For instance, a Massachusetts bar owner put up an African jungle display, including vines and stuffed monkeys, to mock Martin Luther King, Jr. and Black History Month.[29] From the standpoint of the First Amendment, this is high value speech, because it addresses political issues. Had it been deemed protected, the bar owner could not have been fined $4500 nor required to take the display down.[30] But episodes of this kind are rare. We could live with them, as we already live with other episodes of constitutionally protected hate speech.

B. Hostile Environment Law (and Much Else) Violates Free Speech

There is, however, also Supreme Court authority that indicates that all of hostile environment law—every bit of it—is unconstitutional.

Hostile environment law is clearly content-based and hence suspect. In *Reed v. Town of Gilbert,*[31] the Court made preexisting doctrine more

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75 TEX. L. REV. 687 (1997); Fallon, *supra* note 14, at 19–20, 43–44; Robert Post, *Sexual Harassment and the First Amendment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 16, at 383; Dorothy Roberts, *The Collective Injury of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 16, at 365, 375–78.

[27] A New Jersey court observed:

> Public accommodations cases do not involve ongoing organizational connections or the need to make allowances for other special features of the employer–employee relationship, such as its hierarchical qualities. By the very nature of the day-to-day personal involvements which characterize the employment situation, a hostile working environment is a very special problem; it has less in common than the terms seem to convey with insulting or humiliating words or conduct designed to discourage a potential patron's use of a public accommodation.

Franek v. Tomahawk Lake Resort, 754 A.2d 1237, 1242 (N.J. Super. Ct. App. Div. 2000).

[28] Daniel Koontz, *Hostile Public Accommodations Laws and the First Amendment*, 3 N.Y.U. J. L. & LIBERTY 197, 198–204 (2008). Some of the cases described by Koontz appear to restrict even more speech than workplace harassment law restricts. Harassment that is "severe or pervasive" in a hostile work environment claim is that which "alter[s] the conditions of the victim's employment and create[s] an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 23 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)). On the other hand, "a proprietor of a public accommodation may be found liable for discrimination based on a single insult." Koontz, *supra*, at 208.

[29] Koontz, *supra* note 28, at 198–99, 234.

[30] *Id.* at 198–99.

[31] 135 S. Ct. 2218 (2015).

rigid by categorically declaring that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[32] This implies a presumption of invalidity: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[33] This works a revolution in free speech law, calling into question a huge range of government regulations, such as securities law, consumer protection, and professional malpractice. All of these involve the regulation of speech on the basis of its content.

"The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation," Judge Frank Easterbrook observes.[34] "Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."[35] If strict scrutiny is to be applied whenever a law's restrictions "depend entirely on the communicative content"[36] of what is regulated, then even contract law is presumptively invalid (it visits unwelcome consequences on people because of the communicative content of what they have signed).

Perhaps the Court's easygoing approval of hostile environment law in *Harris v. Forklift Systems, Inc.* has now been implicitly overruled. It is hard to be sure, because *Reed* is so wildly inconsistent with so much of existing law that the Court probably did not mean what it said.[37] On the other hand, *Reed* has been taken very seriously by lower federal courts.[38]

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[32] *Id.* at 2227.

[33] *Id.* at 2228 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[34] Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015).

[35] *Id.*

[36] *Reed*, 135 S. Ct. at 2227.

[37] "Robert Post, the dean of Yale Law School and an authority on free speech, said the decision was so bold and so sweeping that the Supreme Court could not have thought through its consequences." Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [perma.cc/4FCY-TMCA]. Frederick Schauer noted, before *Reed*, that "the Securities and Exchange Commission, the National Labor Relations Board, the Federal Trade Commission, the Antitrust Division of the Justice Department, the Office of the Register of Copyrights, the law of evidence, regimes of professional regulation, and quite a few other established mechanisms" are likely to remain undisturbed by free speech law. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1806 (2004). It is unlikely that all this has changed.

[38] *See, e.g.*, Cahaly v. Larosa, 796 F.3d 399, 402 (4th Cir. 2015) (invalidating anti-robocall statute); Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235, 1239 (11th Cir. 2015) (invalidating law that prohibited merchants from imposing a surcharge on credit card purchases but that allowed discounts for cash). Thanks to Genevieve Lakier for the references. The wild doctrinal implications can be limited,

If *Reed* is taken seriously, then all of hostile environment law is unconstitutional when it is applied to speech, because it discriminates on the basis of viewpoint. Content-based discrimination is sometimes permissible if it is narrowly tailored to a compelling state interest. But hostile environment law cannot be defended on this basis. As Justice Alito observed when he was a Third Circuit judge, "There is no categorical 'harassment exception' to the First Amendment's free speech clause."[39]

Hostile environment law, to the extent that the prohibited activity consists of speech, discriminates on the basis of viewpoint, not content.[40] The violation does not consist in speaking to or about members of protected classes, but rather in saying *derogatory* things to or about them. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[41] "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."[42]

Thus, all of hostile environment law, when it is applied to speech, is unconstitutional under the existing doctrinal framework. The state cannot punish the expression of disfavored views in order to prevent the offense created by that expression.[43]

C. Disrupting the Stalemate

Both these opposing conclusions are too crude. But they are all the Court has given us. As the Fifth Circuit Court of Appeals has observed, "The Supreme Court's offhand pronouncements are unilluminating."[44]

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but in ways that are not relevant here. *See* Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981 (2016).

[39] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).

[40] *See* Kingsley R. Browne, *The Silenced Workplace: Employer Censorship Under Title VII*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 16, at 399, 403–04. For this reason, the Court cannot avoid the conclusion of unconstitutionality by manipulating strict scrutiny so that it is easy to satisfy, as it has done in some other recent cases. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015); Holder v. Humanitarian Law Project, 561 U.S. 1 (2010). Viewpoint discrimination is categorically forbidden and cannot be justified by strict scrutiny. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995).

[41] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[42] FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (opinion of Stevens, J.).

[43] *See* Koontz, *supra* note 28, at 211–25.

[44] DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 597 (5th Cir. 1995). *See also Saxe*, 240 F.3d at 207 ("Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection."); Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 195

The tension between hostile environment law and free speech has been apparent to scholars for some time,[45] but it has not made a great deal of difference in practice. The collision between gay rights and religious conservatism may change that.

II. THE COLLISION

A. A Political Problem and a Drafting Problem

There is now significant academic and popular literature about the tension between religious liberty and antidiscrimination protection for gay people.[46] Many religious conservatives feel that it would be sinful for them to personally facilitate same-sex marriages,[47] and they have sought to amend the laws to accommodate their objections. They argue, with some force, that there are plenty of other wedding photographers, and that accommodating their objections would have no significant effect on any gay person's opportunities.[48]

These efforts have met fierce resistance. One state's experience is an illustration and a warning. In March 2015, Indiana enacted a religious liberty law that might have been construed to authorize a defense in such cases.[49] In reaction against the law, thousands of businesses displayed

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n.6 (5th Cir. 1996) (noting that the Supreme Court has "provid[ed] little guidance concerning whether conduct targeted for its expressive content . . . may be regulated under Title VII"); Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 863 (Cal. 1999) (Werdegar, J., concurring) ("No decision by the United States Supreme Court has, as yet, declared that the First Amendment permits restrictions on speech creating a hostile work environment . . . .").

[45] *See* KOPPELMAN, *supra* note 25.

[46] For examples of this, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929 (2015); Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014); and other sources collected in Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 622 n.15 (2015).

[47] Their sense of being besieged is somewhat justified. *See infra* text accompanying notes 69–71.

[48] *See* Koppelman, *supra* note 46, at 639–44. Evidently most Americans are inclined toward accommodation. *See* Maggie Gallagher, *New Poll: 80 Percent of Americans Support the Christian Photographer's Right to Say "No,"* THE PULSE 2016 (Aug. 6, 2015), http://thepulse2016.com/maggie-gallagher/2015/08/06/new-poll-80-percent-of-americans-support-the-christian-photographers-right-to-say-no/ [https://perma.cc/B6E9-P2FA] (linking to multiple polls).

[49] Tony Cook, *Gov. Mike Pence Signs 'Religious Freedom' Bill in Private*, INDIANAPOLIS STAR (Apr. 2, 2015, 2:34 PM), http://www.indystar.com/story/news/politics/2015/03/25/gov-mike-pence-sign-religious-freedom-bill-thursday/70448858 [https://perma.cc/45TH-R6JV]. The Indiana Constitution already contained religious liberty protections, but their scope was ambiguous. *See* Letter from Douglas Laycock, et al. to Brent Steele, Chair, Indiana Senate Judiciary Committee (Feb. 3, 2015), http://www.indianahouserepublicans.com/clientuploads/PDF/RFRA.pdf [https://perma.cc/QZ63-98G3].

window stickers announcing "This business serves everyone."[50] At least ten national conventions—including GenCon, the world's biggest gaming convention—threatened to pull out of the state, the NCAA president expressed doubts about keeping the organization's headquarters in Indianapolis, Angie's List canceled plans to add up to 1000 jobs in the city, and the CEOs of Apple and Nike condemned the law.[51] Governor Mike Pence had been considering a bid for the Republican presidential nomination; the controversy ended that ambition.[52] Pence quickly responded that the bill would be amended to clarify that it did not protect discrimination.[53] The amendment was hastily enacted and signed into law.[54]

There have been similar retreats in other states.[55] Similar legislation seems unlikely in any state but the most conservative.[56]

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[50] Robbie Couch, *Indiana's Anti-Gay Law Prompts Thousands of Businesses to Stand Up for Diversity*, HUFFINGTON POST (Mar. 30, 2015, 3:21 PM), http://www.huffingtonpost.com/2015/03/30/indiana-religious-freedom-bill_n_6969686.html [https://perma.cc/WJ3W-CDXH].

[51] Adam Wren, *The Week Mike Pence's 2016 Dreams Crumbled*, POLITICO MAGAZINE (Apr. 1, 2015),http://www.politico.com/magazine/story/2015/04/mike-pence-indiana-2016-116569.html?ml=po#.VR1xReERGVN [https://perma.cc/VPV8-QKV8]; Jenny Che, *Here Are 17 Major Companies Protesting States' New Anti-Gay Laws*, HUFFINGTON POST (Mar. 30, 2015, 1:47 PM), http://www.huffingtonpost.com/2015/03/30/businesses-protest-gay-laws_n_6969854.html [https://perma.cc/SVM6-NRQC].

[52] Wren, *supra* note 51.

[53] Monica Davey & Mitch Smith, *Indiana Governor, Feeling Backlash From Law's Opponents, Promises a 'Fix,'* N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/04/01/us/politics/indiana-governor-mike-pence-feeling-backlash-from-religious-laws-opponents-promises-a-fix.html [https://perma.cc/F8J9-EQAZ].

[54] *See* Monica Davey, Campbell Robertson, & Richard Pérez-Peña, *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES (Apr. 2, 2015), http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html [https://perma.cc/H59G-9PV5]. Ironically, there is still no statewide antidiscrimination protection for gay people in Indiana; it only exists in eleven municipalities within the state. Kristine Guerra & Tim Evans, *RFRA Revision Does Not Widely Extend Discrimination Protections for LGBT, Experts Say*, INDIANAPOLIS STAR (Apr. 6, 2015, 12:23 PM), http://www.indystar.com/story/news/politics/2015/04/02/yes-rfra-fix-require-christian-businesses-serve-gay-weddings/70848994/ [https://perma.cc/W3MA-F2SR]; *LGBT Rights in Indiana*, WIKIPEDIA, https://en.wikipedia.org/wiki/LGBT_rights_in_Indiana [https://perma.cc/8VRZ-NXFF]. The controversy over the religious liberty law has prompted a new effort to enact more local discrimination bans. Monica Davey, *Gay Rights Battle in Indiana Moves to Local Level*, N.Y. TIMES (Sept. 30, 2015), http://www.nytimes.com/2015/10/01/us/gay-rights-battle-in-indiana-moves-to-local-level.html?_r=0 [https://perma.cc/5JKX-HBAP].

[55] *See* Koppelman, *supra* note 46, at 631–38.

[56] Another proposal that is dead on arrival is the First Amendment Defense Act, a bill that would prevent the federal government from denying any benefit or tax exemption to individuals, organizations, or corporations because of their views on same-sex relationships. *See* H.R. 2802, 114th Cong. (2015); S. 1598, 114th Cong. (2015). Religious conservatives also failed to persuade President Barack Obama to include a broad exemption for religious organizations in an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation and gender identity. Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 21, 2014); Michelle Boorstein, *Faith Leaders: Exempt Religious Groups From Order Barring LGBT Bias in Hiring*, WASH. POST (July 2, 2014),https://www.washingtonpost.com/local/faith-leaders-exempt-religious-groups-from-order-

There are also technical problems with any possible legislative fix. A prominent proposal provides that exemption from public accommodations law should not be provided if "a party to the marriage is unable to obtain . . . similar good[s] or services . . . without substantial hardship."[57] The requirement that the individual face "substantial hardship" is vague, and it is unclear whether this provision could be refined into a more focused rule capable of providing usable guidance. Critics have concluded that this drafting problem makes the proposal unworkable.[58] Another intractable difficulty is that a drafter must decide whether an accommodation would cover people with religious objections to facilitating other categories of marriages, such as interracial marriages.[59] There is no good answer to that question: either we declare that heterosexism is not as bad as racism, a result repugnant to gay rights advocates, or we license discrimination against interracial couples, a result repugnant to almost everyone.

The basic idea is clear, however: if other providers can easily be found, then it would be better if the gay couples and the Christian bakers could be kept apart. The drafters are seeking some way to accomplish that.

Free speech law could provide a different path to the same result.[60]

B. I Didn't Come Here to Be Insulted

I build on a suggestion by the New Mexico Supreme Court—a suggestion that depends on an interpretation of free speech that is doubtful, given the Supreme Court authority I have just reviewed.

Several years ago, a wedding photographer in Albuquerque refused to take photos for a same-sex wedding, and the couple won a discrimination

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barring-lgbt-bias-in-hiring/2014/07/02/d82e68da-01f1-11e4-b8ff-89afd3fad6bd_story.html [https://perma.cc/648G-45SW].

[57] *See* Letter from Edward McGlynn Gaffney, Jr., Thomas C. Berg, Carl H. Esbeck, Richard Garnett, & Robin Fretwell Wilson to Hawaii State Sen. Rosalyn H. Baker (Oct. 17, 2013), mirrorofjustice.blogs.com/files/hawaii-special-session-letter-10-17-13-1.pdf [https://perma.cc/Y3W6-J5TT].

[58] The difficulties are explored in Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 414–22 (2010), and Mary Anne Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 470 n.28 (2015). I acknowledge the problem in Koppelman, *supra* note 46, at 639, but do not offer a solution.

[59] *See* Koppelman, *supra* note 46, at 648.

[60] The free speech argument offered here is not the one that religious conservatives have primarily been making, which focuses on the expressive character of certain professions, such as photography. For the weaknesses of that argument, see Andrew Koppelman, *A Zombie in the Supreme Court: The* Elane Photography *Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77 (2016).

suit.[61] The photographer's religious accommodation claim was rejected by the New Mexico Supreme Court.[62] The U.S. Supreme Court denied certiorari.[63]

The New Mexico Supreme Court declared that the photographer was not, however, without recourse: "businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws."[64]

The New Mexico court's suggestion offers another path to the same result that the "substantial hardship" proviso seeks to achieve. The announcement inevitably would function as a signal, and as such would effectively keep gay customers away, unless they have no reasonable alternative, without technically violating the antidiscrimination statute. If free speech allows Elane Photography to signal its opposition to such marriages, that would probably suffice to persuade gay customers—at least, those who are not spoiling for a fight—to look elsewhere, with no formal change in the antidiscrimination law. Who wants their wedding photographed, or their cake baked, by someone who despises the whole undertaking? Even if you hate that person, who wants the stress and expense of litigation? A business that posts such a disclaimer might never need to violate its conscience by facilitating same-sex marriages.

Such a signal would also avoid the most severe injuries associated with discrimination.[65] Gay customers reasonably do not want to be put in the position of seeking services and then being directly and personally told that they are not eligible for them. They do not want to be induced, by a business that holds itself out to the public and so invites them to contact it, to participate in the activity of their own rejection.[66] The objection is

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[61] Elane Photography, LLC v. Willock, 309 P.3d 53, 59–60 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[62] *Id.* at 60.

[63] *Elane Photography*, 134 S. Ct. 1787.

[64] *Elane Photography*, 309 P.3d at 59. A similar, but significantly different, suggestion was later made by the Colorado Court of Appeals. *See infra* notes 78–79 and accompanying text.

[65] For the argument that insults and harms to one's dignity are the most severe injuries, see Koppelman, *supra* note 46, at 644–47.

[66] The prevention of this specific injury is the most sensible way to understand the "humiliation, frustration, and embarrassment" cited by the authors of the Civil Rights Act of 1964, who declared that "[t]he primary purpose of [that law was] to solve . . . the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." S. REP. No. 88-872, at 16 (1964), *quoted in* Carlos A. Ball, *Sexuality, Third-Party Harms, and the "Live-and-Let-Live" Approach to Religious Exemptions*, LAW, CULTURE & HUMAN., Aug. 24, 2015, at 15, http://lch.sagepub.com/content/early/2015/08/21/1743872115601597.full.pdf+html [https://perma.cc/9RNN-GBC5]. Carlos

somewhat analogous to religious conservatives' objections to participating in the celebration of same-sex unions. In each case, what is at issue is not simply the knowledge that activity is happening with which they disagree; it is that they are being forced to be part of that activity. That direct, personal insult can be more wounding to gay customers than the mere knowledge that there are people out there who do not want to deal with them. Clear signals would prevent that from happening by keeping these parties apart from one another.

Of course, it may not work. The announcement may function as a magnet rather than a repellent, drawing gay rights activists eager to punish those whose views they find odious. Some people *are* spoiling for a fight.[67]

Businesses with conservative religious views have sometimes been subjected to sustained attack even when they did not discriminate. In Indiana, a TV reporter walked into a pizzeria to ask the owners what they thought of the religious accommodation issue, and they indicated that they would not cater a gay wedding.[68] They were then subjected to a flood of vituperation and one threat of arson, which led them to temporarily close the business and consider leaving the state.[69] A Canadian jeweler willingly custom-made a pair of engagement rings for a same-sex couple, but when they discovered that the jeweler had publicly posted a sign saying, "The sanctity of marriage is under attack. Let's keep marriage between a man

Ball reads the prohibition of discrimination more broadly, to forbid any actions that "engender a sense of inferiority, vulnerability, and second-class citizenship in members of a class that . . . have been the victims of much discrimination and stigmatization in the past." *Id.* at 16. That would arguably foreclose the solution suggested by the New Mexico court.

[67] It is not apparent why those who do want a fight, in this context, should have their claims honored by the state. This is why it would be better for an announcement of one's opposition to same-sex marriage to trigger an exemption in the context of public accommodations. *See* Koppelman, *supra* note 46, at 646–49. That, however, would require legislation of a kind unlikely to be enacted. *See supra* text accompanying notes 47–54. Such people should be regarded in the same way as those who spout religious bigotry: even if they are exercising a legal right, they are wrong to exercise it. Private conversations have persuaded me that they are so regarded by many in the gay rights leadership.

[68] Conor Friedersdorf, *Should Mom-and-Pops That Forgo Gay Weddings Be Destroyed?*, ATLANTIC (Apr. 3, 2015), http://www.theatlantic.com/politics/archive/2015/04/should-businesses-that-quietly-oppose-gay-marriage-be-destroyed/389489/ [https://perma.cc/MS8V-F44W].

[69] The pizzeria eventually reopened, and some months later a gay couple took great satisfaction in buying two pizzas there and serving it at their wedding ceremony. Billy Hallowell, *Gay Couple Ordered Two Large Pies From Memories Pizza. What They Did Next Is Getting a Lot of Attention.*, BLAZE (Sept. 29, 2015, 2:19 PM), http://www.theblaze.com/stories/2015/09/29/memories-pizza-said-it-wouldnt-cater-same-sex-weddings-but-this-gay-couple-claims-they-tricked-the-shop-into-doing-just-that/ [https://perma.cc/DNU3-RXT7]. The pizzeria owner was untroubled when he learned the truth about the order. "'We weren't catering to their wedding,' he said. 'They were picking [pizzas] up.'" Billy Hallowell, *Christian Owner of Memories Pizza Responds to Claim That His Shop 'Catered' a Gay Wedding*, BLAZE (Oct. 1, 2015, 10:45 AM), http://www.theblaze.com/stories/2015/10/01/memories-pizza-owner-responds-to-claim-that-his-shop-catered-a-gay-wedding/ [https://perma.cc/R8Q9-S7QQ].

and a woman," the couple demanded their money back.[70] After being inundated with hateful e-mails, phone calls, and threats, the jeweler complied.[71]

This, however, can happen with any accommodation: even if religious conservatives could invoke accommodation on an ad hoc basis, as they are asking, the world would inevitably learn that this had happened. (Doubtless many are simply staying closeted, hoping that they are never put in the position of having to disclose their views.) Episodes where the Christian conservatives are subject to ugly denunciations and threats will become less frequent as more and more of this population is willing to make itself known. There is a lesson here from the history of the gay rights movement: as more people come out of the closet, the cost of doing so will decline. It is possible for a society to live with open disagreement about moral fundamentals. We are already doing that with respect to abortion. Those with pro-life or pro-choice views are not often subjected to this kind of mistreatment.

Whatever the consequences, dissenters from a regime of gay equality must be allowed to speak when they are willing to bear the social costs of doing so, because any legitimate regime must protect dissent.[72] Some gay rights supporters will worry about the danger that allowing this speech will trigger a cascade of similar speech that legitimates these views. That people will be persuaded by bad ideas is, however, a perennial danger of free speech.

Finally, this solution, based in the Constitution, would require no new legislation. Given the present state of political paralysis, that is a big advantage. Constitutional law is not contingent on politics, and free speech law, in fact, has managed to protect some very unpopular speech.

Because no legislative language need be agreed upon, it would not be necessary to work out the intractable question, unlikely to arise often in practice but radioactive as an abstract principle, of whether an accommodation would equally extend to religious opposition to interracial

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[70] Rod Dreher, *Heads LGBTs Win, Tails Christians Lose*, AM. CONSERVATIVE (May 21, 2015, 5:15 PM), http://www.theamericanconservative.com/dreher/heads-lgbt-win-tails-christians-lose/ [https://perma.cc/WY5R-DKE5]; *Jewelry Store Sign Prompts Same-Sex Couple to Ask for Refund*, CBC NEWS (May 16, 2015, 7:30 PM), http://www.cbc.ca/news/canada/newfoundland-labrador/jewelry-store-sign-prompts-same-sex-couple-to-ask-for-refund-1.3077192 [https://perma.cc/H2AT-D2V7].

[71] Dreher, *supra* note 70; *Jewelry Store Sign Prompts Same-Sex Couple to Ask for Refund*, *supra* note 70.

[72] *See generally* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 87–109 (1990). The point is developed, with specific reference to the gay rights issue, in Nan D. Hunter, *Pluralism and Its Perils: Navigating the Tension Between Gay Rights and Religious Expression*, 15 GEO. J. GENDER & L. 435 (2014).

marriages. Free speech already resolves this question, on the side of equivalence: citizens have a right to express their disapproval of both kinds of marriages.

But it is not clear that constitutional law is reliable in this context. As we have seen, the pertinent doctrine is confused.

C. Legal Limits on Signaling

The New Mexico court does not notice that this accommodation might require modification of the law of harassment. Illinois is not the only state that might treat this kind of disclaimer as creating an actionable hostile environment.[73] Eight other states and the District of Columbia also specifically prohibit announcements that a protected class of customers (such as gay customers) is unwelcome.[74] Others construe their general antidiscrimination laws to bar such hostile environments in places of public accommodation.[75] It is not necessary to construe these statutes to reach speech, since hostile environments can be created in many other ways.[76]

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[73] *See* Koontz, *supra* note 28, at 198–204; Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299, 318–26 (2000). There is no clear authority on whether New Mexico is one of those states.

[74] *See* COLO. REV. STAT. § 24-34-601 (2014); DEL. CODE ANN. tit. 6, § 4504 (2013); D.C. CODE § 2-1401.01 (2014); 775 ILL. COMP. STAT. 5/1-102 (2015); ME. STAT. tit. 5, §§ 4552, 4591–92 (2007); MASS. GEN. LAWS ch. 272, § 98 (2016); N.H. REV. STAT. ANN. § 354-A:16 (1998); N.Y. EXEC. LAW § 296 (McKinney 2016); 11 R.I. GEN. LAWS § 11-24-1 (2016); WISC. STAT. § 106.52 (2015). The statutes of five more states have similar language barring communications indicating that protected groups are unwelcome, but do not include sexual orientation as a forbidden basis of discrimination. ALASKA STAT. § 18.80.230 (2015); KY. REV. STAT. ANN. § 344.140 (West 1992); MONT. CODE ANN. § 49-2-304 (2015); 43 PA. STAT. AND CONS. STAT. § 955 (West 2015); W. VA. CODE § 5-11-9 (2015).

Similarly, the federal Fair Housing Act does not permit property owners "[t]o make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604(c) (2012). First Amendment challenges to this provision have been rejected because the speech in question threatens illegal conduct, and because it is commercial speech, which has a reduced level of protection. *See* Ragin v. N.Y. Times Co., 923 F.2d 995, 1002 (2d Cir. 1991); United States v. Hunter, 459 F.2d 205, 212–13 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972). Neither of these is true of the announcement contemplated by the New Mexico court. The Fourth Circuit construed the statute only to reach commercial speech: "paid advertisements which communicate grievances, protest claimed abuses, seek financial aid for a cause, or engage in other protected expressions are not restrained by the Act." *Hunter*, 459 F.2d at 211 n.6.

[75] *See generally* Koontz, *supra* note 28, at 198–204 (reporting, inter alia, cases from states not included in *supra* note 69). It is doubtful whether the Civil Rights Act of 1964 can be construed to cover retail stores, bakeries, or photographers. *See* Joseph William Singer, *supra* note 46, at 942; 42 U.S.C. § 2000a (2012) (mandating equal access to "lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments").

The recently introduced Equality Act of 2015, which would add sexual orientation to the discriminations barred by the Civil Rights Act of 1964, also clarifies that the Act covers "any establishment that provides a good, service, or program, including a store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency, or funeral parlor, or establishment that provides health care, accounting, or legal services." S.

Businesses are prohibited from announcing their intention to discriminate. The validity of that prohibition is not in doubt, because discrimination is illegal, and threats to engage in illegal conduct are not protected speech.[77] The prohibition could, however, be construed to bar business people not only from posting signs like the ones described by the New Mexico court, but also from giving interviews and otherwise publicizing their reservations about facilitating same-sex marriages. That would produce a situation like that of Chick-fil-A, described at the beginning of this Article.

The limits on signaling that can be created by hostile environment law are apparent in the Colorado Court of Appeals' explanation, in another bakery case, of the options. The story that the Colorado court tells is significantly different from New Mexico's:

> [The discrimination statute] does not preclude Masterpiece from expressing its views on same-sex marriage—including its religious opposition to it—and the bakery remains free to disassociate itself from its customers' viewpoints. We recognize that section 24-34-601(2)(a) of CADA prohibits Masterpiece from displaying or disseminating a notice stating that it will refuse to provide its services based on a customer's desire to engage in same-sex marriage or indicating that those engaging in same-sex marriage are unwelcome at the bakery. However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA. Masterpiece could also post or otherwise disseminate a message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics. Such a message would likely have the effect of disassociating Masterpiece from its customers' conduct.[78]

The Colorado opinion carefully leaves ambiguous the crucial question of whether the bakery could signal its opposition to same-sex marriage.

1858, 114th Cong. (2015); H.R. 3185, 114th Cong. (2015). If it became law, the conflict between gay rights and religious liberty would become more salient, and the need to clarify the free speech question more urgent.

[76] For example, a business may treat black customers worse than white customers without refusing service altogether. *See, e.g.*, Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1347–48 (N.D. Ga. 2005).

[77] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388–89 (1973); Eugene Volokh, *Why May the Government Ban Businesses from Saying "We Won't Bake Cakes for Same-Sex Weddings"?*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/06/why-may-the-government-ban-businesses-from-saying-we-wont-bake-cakes-for-same-sex-weddings/ [https://perma.cc/Y3J7-3F2K]. Thus, the Court has observed that the prohibition of discrimination can prevent employers from posting signs saying "White Applicants Only." Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 62 (2006).

[78] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 288 (Colo. App. 2015) (footnote omitted) (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980)), *cert. denied*, 2016 WL 1645027 (Colo. 2016), *petition for cert. filed sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n (U.S. July 25, 2016) (No. 16-111).

The New Mexico court contemplated that the photographer could "post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws."[79] Such a disclaimer, however, might violate Colorado's prohibition on indicating that those participating in same-sex marriage are unwelcome. So instead the bakery can only offer a bland generic statement that it is required to obey the law. That would considerably blunt the effectiveness of the signal. Gay people would still walk into these businesses, with bad consequences for the gay people, the businesses, or both.

D. The Sweet Cakes Order

If courts consider only the imperatives of antidiscrimination law, and are oblivious of the free speech issues, the consequences for speech are likely to be pretty bad.

The problem was starkly presented in an Oregon case in which a bakery, Sweet Cakes by Melissa, was assessed $135,000 in damages for emotional suffering after it refused to bake a cake for a same-sex wedding.[80] The final order by the Commissioner of the Oregon Bureau of Labor and Industries appropriately found liability, but it also banned notices of intent to discriminate, pursuant to a state statute that specifically banned such notices.[81] This would have been correct with respect to plain notices that some customers are unwelcome, such as an earlier Oregon case involving a tavern's posting that read "NO SHOES SHIRTS SERVICE NIGGERS."[82] The Oregon order, however, declared that the bakery had made such an announcement by more general statements such as "This fight is not over. We will continue to stand strong," made in the context of ongoing litigation.[83] The Commissioner's strained interpretation leaves

[79] Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[80] In re Klein, Case Nos. 44-14 & 45-14, at 42–43 (Ore. Bur. Lab. & Indus. July 2, 2015), http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf [https://perma.cc/7859-4W37] [hereinafter Klein final order].

[81] *Id.* at 22–26.

[82] In the Matter of John W. Masepohl, dba the Pub, 6 BOLI 270, 273 (Ore. Bur. Lab. & Indus. June 24, 1987). A more difficult free speech problem was a sign on the same tavern saying "VIVA APARTHEID." *Id.* The Commissioner recognized this as "pure political speech," which "is accorded the utmost deference," but held that it violated the statute because in context it "clearly communicate[d] that services within would be refused, withheld, denied, or that discrimination would be made on the bases of race." *Id.* at 281–82 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[83] Klein final order, *supra* note 80, at 27.

doubt as to whether a disclaimer such as the one described by the New Mexico court would have been deemed to violate the statute or the order.[84]

The First Amendment had better have something to say about an agency's order that its adversary in litigation must not criticize the agency's own conduct. The order, in context, implies that any statement of disagreement with the agency's interpretation of its powers or with the state's antidiscrimination laws will be construed as an illegal threat to violate those laws. A statement of generalized opposition to same-sex marriage could be construed the same way.

No surprise here: many local officials evidently do not understand free speech law; they routinely enact speech-suppressing laws that are obviously unconstitutional, and courts routinely strike them down.[85] It is in those cases that the rules laid down by the Supreme Court prove their usefulness. They give the lower courts clear marching orders.

With the law of hostile environment, however, there is no clarity. The Court has decided that a wink and a nudge will do. In a different way, the Colorado court also permits that: maybe customers will know what a business means when it says that the law requires it not to discriminate. That works only if everyone understands what the winks and nudges signify.

In this context, we need more law.

III. THE ARTHRITIC FIRST AMENDMENT

Commentators who have confronted the tension between harassment law and free speech have almost all concluded that a new, narrowly bounded exception to free speech protection for workplace harassment is justified. Daniel Koontz, for example, proposes that a new exception to free speech protection should be created for public accommodations, allowing restriction only when:

> (1) The proprietor or employee of the public accommodation speaks directly and specifically to a member of a protected class, as opposed to the public at large;

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[84] *See* Ken White, *Lawsplainer: So Are Those Christian Cake-Bakers In Oregon Unconstitutionally Gagged, Or Not?*, POPEHAT (July 8, 2015), http://popehat.com/2015/07/08/lawsplainer-so-are-those-christian-cake-bakers-in-oregon-unconstitutionally-gagged-or-not/ [https://perma.cc/LN97-3K3T]. The Commissioner is on firmer ground when he says that the bakery violated the law when it told the couple, "[W]e don't do same-sex marriage, same-sex wedding cakes." *Id.* (quoting Klein final order, *supra* note 80, which in turn cited a radio interview). This was a statement to a single couple, included as part of a historical narrative of the transaction, but it indicated future intentions and was never disavowed.

[85] *See* Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 154–55 (2009).

(2) The speech would cause a reasonable member of the protected category to believe that the proprietor did not want to extend to him or her full and equal enjoyment of the accommodation as a result of his or her membership in that protected category; and

(3) The totality of the circumstances indicates that the proprietor's offensive statements are motivated by a desire to exclude the patron because of the patron's membership in a protected category.[86]

The free speech attractions of this exception are clear.[87] It would mean that a proprietor has a right to speak to the public through its business, which is probably the most effective means of communication that a small business owner has at her disposal. This formulation also vindicates the most exigent concerns of antidiscrimination law by barring specific mistreatment, including verbal mistreatment, of members of protected classes, and banning announcements of intention to illegally discriminate, such as "Whites Only" signs.

As we have seen, it also largely avoids the gay rights–conservative religion collision. By enabling religious businesses to signal their views on same-sex marriage, it reduces to the vanishing point the likelihood that those businesses will ever be asked by gay customers to do what their conscience forbids.

This solution is, however, foreclosed by the Court's declaration that it will craft no new exceptions to free speech protection.[88] The consequence

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[86] Koontz, *supra* note 28, at 231. Koontz is, to my knowledge, the only scholar who has proposed an exception specifically tailored for public accommodations. For other writers who have proposed similarly nuanced exceptions for the workplace, see GREENAWALT, *supra* note 15; Balkin, *supra* note 26; Estlund, *supra* note 26; Fallon, *supra* note 14; Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to a Content-Neutral Hostile-Environment Theory*, 1996 UTAH L. REV. 227; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). The exception is Browne, *supra* note 24. Browne would categorically bar admission of any evidence of speech in discrimination cases.

[87] They are so clear that Eugene Volokh has proposed the same distinction be drawn as a general free speech matter, so that even in the workplace, speech not directed at a particular person, such as words and pictures on walls and bulletin boards, would be protected. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 738 (2013); Volokh, *supra* note 86, at 1843–71. In light of the exclusionary effect of hostile environments in the workplace, this goes too far. See *supra* text accompanying notes 23–25. But the arguments for restricting one-to-many speech are persuasive only in the workplace, not in other contexts, such as public accommodations. See *supra* text accompanying notes 27–28. In those contexts, Volokh is right. Even if one were to extend the logic to public accommodations, liability should be limited, as Charles Calleros has suggested, to "speech which is obviously discriminatory, severely disturbing, and unavoidably and pervasively within the view of unwilling audiences." Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person*," 58 OHIO ST. L.J. 1217, 1274 (1997). The kind of notice contemplated by the New Mexico court does not rise to this level.

[88] United States v. Stevens, 559 U.S. 460, 470 (2010). For further critique of *Stevens*, see Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 672–77 (2016).

of that decision is to freeze free speech law in a way that is not even good for the protection of speech. I have already noted the Court's contradictory approach to the free speech harassment question. The state of free speech law is, in fact, even worse than I have thus far shown, because the Court has blocked the most attractive way out of the tangle.

In *United States v. Stevens*,[89] in which the Court invalidated a law criminalizing depictions of the illegal killing of animals, Chief Justice Roberts announced that there would henceforth be no new categories of unprotected speech:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."[90]

Every established exception to free speech protection, Chief Justice Roberts declared, is based upon "a previously recognized, long-established category of unprotected speech."[91] Before speech can be regulated, the state must show a "long-settled tradition of subjecting that speech to regulation."[92] There is no tradition of regulating dogfighting videos, so the Court invalidated a law that criminalized them.[93]

By this logic, the prohibition of speech that creates a hostile environment, in the workplace or in public accommodations, must also be "presumptively invalid" because it "explicitly regulates expression based on content."[94] The speech that generates the hostile environment (for example, the notice contemplated by the New Mexico court) often consists of truthful information about what the proprietor of the establishment believes about the protected group. It is objectionable only because of the viewpoint it conveys. Viewpoint discrimination is unconstitutional.

Stevens misrepresents the history of speech regulation in the United States. The idea of categories of low-value speech is an invention of the

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[89] 559 U.S. at 481–82 (2010).

[90] *Id.* at 470 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).

[91] *Id.* at 471.

[92] *Id.* at 469.

[93] *Id.* at 481–82. The Court relied on the same logic (and cited *Stevens*) in invalidating a ban on the sale of violent video games to minors in Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 2734, 2742 (2011).

[94] *See Stevens*, 559 U.S. at 468. *See also* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), quoted *supra* text accompanying notes 31–33.

Court that has been developed since the 1940s. The history the Court deems dispositive is a history that does not exist.[95] The decision about what kind of speech is unprotected, embodied in present doctrine, cannot be attributed to "a judgment by the American people," as *Stevens* asserts.[96] At the time of the First Amendment's enactment, there was remarkably little reflection about what it would mean in practice.[97] That task has been left to judges. Modern free speech law is a product of common law development, not of text.[98]

A better account of First Amendment exceptions has been offered by Kagan, in an article written before she became a judge. Justice Kagan observes that the lack of protection for some kinds of speech represents a contestable value judgment, and may even involve viewpoint discrimination.[99] The category of unprotected obscenity, for example, restricts "a single (disfavored) viewpoint about sexual matters," and "invokes community standards of offensiveness."[100] The viewpoint discrimination rests on the view that "only the restricted ideas cause great harms and have sparse value."[101] Nonetheless, "partly because of the long-established nature of the category, such regulation may give rise to fewer concerns of compromising First Amendment principles."[102] Slippery slope and chilling effect arguments are predictive. If the prediction has been falsified by experience, then these concerns are ameliorated. "A long tradition of regulating a particular category of low value speech," a law

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[95] *See generally* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

[96] 559 U.S. at 470.

[97] *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

[98] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 51–76 (2010).

[99] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

[100] *Id.* at 473 n.166.

[101] Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 899 (1993).

[102] *Id.* at 897. Kagan, as Solicitor General, proposed the balancing test that was rejected by the Court in *Stevens*. The difference between Justice Kagan's article and her position in her brief for the United States is that in the latter, she did not even concede a strong presumption against new categories. Instead, she declared that speech can be regulated on the basis of its content whenever "the First Amendment value of the speech is 'clearly outweighed' by its societal costs." Brief for the United States at 12, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 1615365, at *12 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). The explanation of the difference could be the breadth of the statute she was obligated to defend. The law was so loosely worded that it prohibited films of hunting and bullfighting, and documentaries designed to document the mistreatment of animals. *Stevens*, 559 U.S. at 477–82. She may have judged that only a broad balancing test could sustain that statute. In *Reed v. Town of Gilbert*, she endorsed a milder proposition: "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function." 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring in the judgment).

professors' brief in *Stevens* observed, "creates a historical understanding of the contours and definition of the category and demonstrates from experience that the category can be regulated without doing undue damage to the First Amendment."[103] The *Stevens* Court cited "historic and traditional categories long familiar to the bar,"[104] but it took the existence of these as evidence for its bogus historical narrative when it is really just an aid to judicial construction.

If that is the case, however, then the *Stevens* Court was wrong to disclaim "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[105] The Court has always had, and has often exercised, that authority. The question is how it ought to exercise it. The Court may reasonably be "reluctant to mark off new categories of speech for diminished constitutional protection," reflecting "skepticism about the possibility of courts drawing principled distinctions to use in judging governmental restrictions on speech and ideas."[106] A presumption, however, is not the same as a rigid rule.

It is puzzling why the *Stevens* Court declared the shape of the law fixed for all time and then attributed that decision to the Framers. None of the briefs, not even the ones that directly attacked the government's proposed balancing test,[107] proposed anything as wooden and ahistorical as that. If the question is whether a given exception is consistent with the purposes of free speech, then hostile environment law generally presents no problem, because it has not, in fact, had any severe effect on speech. Until now. And now that the problem has arisen, the Court is curiously disabled from being helpful.

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[103] Brief of Constitutional Law Scholars Bruce Ackerman et al. as Amici Curiae in Support of Respondent at 6, *Stevens*, 559 U.S. at 460 (No. 08-769), 2009 WL 2331222, at *5–6.

[104] *Stevens*, 559 U.S. at 468 (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment)).

[105] *Id.* at 472.

[106] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 804–05 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[107] In addition to Ackerman, see Brief for the Cato Institute as Amicus Curiae in Support of Respondent at 16–27, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 2331221, at *16–28; Brief of the DKT Liberty Project, the American Civil Liberties Union, and the Center for Democracy and Technology, as Amici Curiae in Support of Respondent at 4–13, *Stevens*, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 2247129, at *4–13; Brief of First Amendment Lawyers Association as Amicus Curiae in Support of Respondent at 9–10, 15–18, *Stevens*, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 2331224, at *9–10, *15–18; Brief of Amici Curiae Association of American Publishers, Inc. et al. in Support of Respondent at 11, *Stevens*, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 2331225, at *11; Brief Amici Curiae of the Reporters Committee for Freedom of the Press and Thirteen News Media Organizations in Support of Respondent at 20–22, *Stevens*, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 2219305, at *20–22.

Free speech law is intentionally inflexible. It is a body of law based on rules rather than standards, precluding decisionmakers from considering all the relevant interests in a decision.[108] That is important in contexts in which judges are likely to err in favor of suppression at the same time that other state actors are making similar mistakes, creating a general climate of fear that chills public discussion.[109] It does not, however, justify the Court in self-calcification, blinding itself to consequences at the architectonic level.[110]

The Court's ringing defense of free speech paradoxically results in less speech protection. It means that the only way in which the Court can allow hostile environment law to operate—and the Court has clearly indicated that it will allow it—is to pretend (as it did in *Harris v. Forklift Systems, Inc.*) that it presents no free speech issue at all. That authorizes preposterous results such as the Oregon decision. It might even permit the suit against Chick-fil-A to go forward.

IV. SOME NEGLECTED PURPOSES OF FREE SPEECH

Justice Elena Kagan has suggested that the increasingly rigid free speech doctrine should be administered "with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[111] What is that function?

One obvious problem with a restriction of a business's capacity to announce its disagreement with antidiscrimination law is that this interferes with political speech. The Court has repeatedly said that political speech is at the core of free speech protection.[112] The baker or florist is obeying the law under protest. It will act as the law demands it act, but it regards the

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[108] *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 77–78 (1991); Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 9–11 (1989).

[109] The germinal thinker on this point is Thomas Emerson, who called for categorical free speech rules in response to the specific experience of suppression during the McCarthy era. *See* Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 704–06 (2013).

[110] *See* Koppelman, *supra* note 109, at 704–06.

[111] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring in the judgment).

[112] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (per curiam) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."). Both of these cases were quoted with approval in *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012).

law as wrong and wants to make that fact known. That is political speech under even the most parsimonious definition of the term.[113]

However, hostile environment law does not target political speech. Much of free speech law is primarily concerned with illegitimate government purpose. Many of its objective tests are proxies for detecting those purposes.[114] The paradigmatic wrong, for the political understanding of free speech, is the suppression of speech in order to safeguard incumbents from political challenge. Harassment law does not do that. One might infer that it is appropriate to draw the line where the Colorado court drew it:[115] you can publicize your views, but not in a way that will make employees or prospective customers feel unwelcome.

There is, however, a second specific purpose that free speech deems beyond the pale: the aim of protecting citizens from the specific offense of discovering that some of their fellow citizens despise what they hold sacred. The free speech tradition is not only concerned about politics. The offense that hostile environment law tries to prevent in this context is a kind of offense that free speech law demands that we tolerate. The harm here is of the same kind as the harm caused by heretical or blasphemous speech.

Long before James Madison argued that democracy logically entailed the freedom to criticize incumbent officeholders,[116] the principal focus of arguments against censorship was the prohibition of heresy and blasphemy. Free speech and freedom of religion were not always in separate analytical silos. In Reformation Europe, religious diversity was fundamentally about the embrace of different theological propositions. John Milton, no democrat—he was an enthusiastic functionary of the military dictator Oliver Cromwell[117]—claimed, in his 1644 essay *Areopagitica*, that government had no business policing arguments about religious truth.[118] The focus on political speech is a late addition to a tradition that was at least 150 years old when Madison wrote.

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[113] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971) (arguing that, because the function of the free speech guarantee is to protect political discussion, "[t]he category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative").

[114] *See generally* Kagan, *supra* note 99.

[115] *See supra* text accompanying notes 78–79.

[116] James Madison, *Republican Manifesto: The Virginia Report*, *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 229, 243 (Marvin Meyers ed., rev. ed. 1981).

[117] CHRISTOPHER HILL, MILTON AND THE ENGLISH REVOLUTION 165–86 (1977).

[118] JOHN MILTON, *Areopagitica*, *in* COMPLETE POEMS AND MAJOR PROSE 716 (Merritt Y. Hughes ed., 1957) (1644).

Too much free speech theory supposes that there must be a single unifying reason for protecting speech. (A number of single unifying reasons—democracy, the search for truth, individual self-realization—are on offer in the literature.) Rather, freedom of speech is an ongoing practice that has had a large range of justifications and effects.[119] Any of those effects, if people value it, can generate another kind of justification. Courts rely on the justifications that make sense to them when they construe constitutional principles.

Here I note a cluster of three related free speech goals. One is, what Milton advocated, the promotion of dissenting speech that is broadly "religious," concerned about the final ends that people ought to pursue.[120] This, not political speech, is the primitive core of the right to free speech. Constitutional provisions should be read in light of the specific evils that they were originally intended to prevent.[121]

I am not claiming that the religious character of speech should be relevant to the analysis of whether it is legally protected.[122] Rather, the religious provenance of free speech helps to show why the harm associated with heresy and blasphemy—harm not obviously associated with electoral democracy—is a kind of harm that cannot justify restrictions on speech. In a regime of free speech, we must learn to live with others whose understanding of ultimate values is radically at odds with, and offensive to, our own.

A second important value is mutual transparency. Recent work on the cultural specificity of ideals of free speech, and their roots in dissenting Protestantism, raises the question whether the idea of free speech has anything to offer non-Western civilizations.[123] Democracy provides a familiar answer: authoritarian government has the same pathologies everywhere, and official accountability is impossible without free speech. But another is the opportunity free speech provides to close the "gulf that separates class from class and soul from soul,"[124] as Shaw's Henry Higgins put it. Seana Shiffrin argues that, "given that our minds are not directly accessible to one another, speech and expression are the only precise

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[119] *See* Koppelman, *supra* note 109, at 687–91.

[120] This one has not been entirely neglected. *See* Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 793–95 (1996).

[121] JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1923–25 (2012).

[122] Thanks to Marty Redish for demanding clarification of this point.

[123] *See, e.g.*, JOHN DURHAM PETERS, COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION (2005).

[124] Bernard Shaw, *Pygmalion*, *in* 1 COMPLETE PLAYS WITH PREFACES 197, 248 (1962).

avenues by which one can be known *as the individual one is* by others."[125] Censorship enacts "a sort of solitary confinement outside of prison but within one's mind."[126] Because free communication is essential to avoid this pathology, it is a fundamental human right.[127]

The third is that free speech welcomes, what many people will find troubling, the open collision of moral views. When John Stuart Mill's classic defense of free speech balances liberty against harm, Jeremy Waldron has observed, that balancing cannot count as harm the moral distress of having your most cherished views denounced, or of contemplating ways of life antithetical to your own.[128] A core value of free speech is that it will and must induce such distress. Mill, and liberalism more generally, place great value on "*ethical confrontation*—the open clash between earnestly held ideals and opinions about the nature and basis of the good life."[129] Moral distress, "far from being a legitimate ground for interference . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place."[130] Part of the reason for protecting illiberal ideas is that they promise to induce that distress.[131]

The gay rights movement has benefited from all three aspects of free speech. It was permitted, by free speech law, to disseminate views that were almost universally regarded as so offensive to religious sensibilities as to be intolerable.[132] It permitted gay people to escape that societal institution of solitary confinement familiarly called "the closet."[133] It was allowed with impunity to provoke enormous moral distress in its adversaries.

This valorization of moral distress is not peculiar to Mill. It is a central part of the free speech tradition. John Durham Peters observes that, since Milton, the ideology of free speech has celebrated the ability to encounter

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[125] SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 88–89 (2014).

[126] *Id.* at 91.

[127] *Id.* at 117.

[128] *See* Jeremy Waldron, *Mill and the Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 115 (1993).

[129] *Id.* at 120.

[130] *Id.* at 125. Waldron's more recent call for restriction of hate speech is in tension with this argument. *See* Andrew Koppelman, *Waldron, Responsibility-Rights, and Hate Speech*, 43 ARIZ. ST. L.J. 1201, 1215–21 (2011).

[131] This is one reason why the protection of dissent is so central to the free speech tradition. *See generally* SHIFFRIN, *supra* note 72.

[132] *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 93–96, 116–23 (1999).

[133] *Id.* at 123–25.

evil ideas and come away unscathed: "Satan represents a key figure in the dramatis personae of free expression, the troublemaker who nonetheless brings about, by the very force of his negativity, good in the end."[134] Pornographers, Nazis, and other transgressors of the sacred thus form a stable alliance with civil libertarians. Peters emphasizes the cultural peculiarity of this valorization of "sponsoring study-abroad sojourns in the land of fire and brimstone."[135] Most cultures "do not train souls for the ironic contortionism that liberal subjectivity calls for."[136] Rather, most of the world's population "cannot hear certain things without wanting to hit somebody."[137]

The three purposes are parts of a coherent whole.

What does it mean to seek transparency—to reveal oneself to others? We define our identities in terms of concerns that are deeper than our mere preferences that respond to demands that emanate from beyond ourselves.[138] Charles Taylor writes:

> To know who I am is a species of knowing where I stand. My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon within which I am capable of taking a stand.[139]

Self-disclosure is disclosure of what matters to me, what I care about deeply.[140] That is why I reveal something important about myself (and make myself vulnerable) when I share with you a book or poem that moves me. It is also why the protection of heresy and blasphemy—unorthodox ideas about the most urgent human concerns—is closely tied to the value of transparency.

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[134] PETERS, *supra* note 123, at 84.

[135] *Id.* at 14.

[136] *Id.* at 93.

[137] *Id.* It is, on the other hand, possible to take pleasure in encountering the remarkable variety of humanity, and that pleasure is not confined to Western culture. *See* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 226–56 (1990).

[138] *See* CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 31–41 (1991).

[139] CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 27 (1989). A related indicator of identity is what a person will not do under any circumstances. Harry Frankfurt writes: "As the set of its essential characteristics specifies the limits of what a triangle can be, so does the set of actions that are unthinkable for a person specify the limits of what the person can will to do. It defines his essence as a volitional creature." Harry G. Frankfurt, *Rationality and the Unthinkable*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 177, 188 (1988). A person who will do anything if the price is right has only accidental characteristics; he has no stable identity at all. *See* Harry G. Frankfurt, *Autonomy, Necessity, and Love*, *in* NECESSITY, VOLITION, AND LOVE 129, 138–39 (1999). The relation between Frankfurt's and Taylor's orientation in moral space should be obvious.

[140] "[T]he things that we love tell us what we are." THOMAS MERTON, THOUGHTS IN SOLITUDE 10 (1958).

On one of the few occasions when the Court has tried to define "religion," it quoted with approval David Saville Muzzey's definition of religion as "the devotion of man to the highest ideal that he can conceive," and Paul Tillich's description of God as "the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any reservation*."[141] Religious speech in this broad sense is speech about our orientation in what Taylor calls "moral space, a space in which questions arise about what is good or bad, what is worth doing and what not, what has meaning and importance for you and what is trivial and secondary."[142] Claims about our appropriate orientation in moral space then should be understood as a central object of free speech protection.[143]

Of course, often there is no joy in discovering what others really think of the gods we worship. It is much more comfortable to delude ourselves with the thought that everyone basically agrees with us about these fundamentals.[144] The suppression of blasphemy and heresy thus encourages a kind of solipsism.[145] If we are going to have transparency, if we are to escape the solitary confinement of our own minds, then we are going to have to learn to live with moral confrontation.

Antidiscrimination law is in some tension with all three of these values.

It aims to limit diversity of opinion by guaranteeing that traditionally stigmatized groups need not be branded with inferior social status. Its ultimate purpose is to eradicate racism, sexism, and other ideologies that regard some citizens as inferior and degraded.[146]

That means that it must aspire to limit the transparency of minds. If you regard your black employees or customers as members of an inferior

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[141] United States v. Seeger, 380 U.S. 163, 183, 187 (1965) (first quoting DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION 95 (1951); and then quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)). The Court was pushed toward this abstract characterization by the country's growing religious diversity, which confounds more theistic definitions. *See* Andrew Koppelman, *The Story of* Welsh v. United States*: Elliott Welsh's Two Religious Tests*, *in* FIRST AMENDMENT STORIES 293 (Richard W. Garnett and Andrew Koppelman, eds., 2012).

[142] Taylor, *supra* note 139, at 28.

[143] It is also an indispensable precursor of any political decision, and so should be protected by any Madisonian argument for protecting speech. *See* Andrew Koppelman, *Madisonian Pornography or, The Importance of Jeffrey Sherman*, 84 CHI.-KENT L. REV. 597 (2009).

[144] Iris Murdoch argued that the "chief enemy" of morality is "personal fantasy: the tissue of self-aggrandizing and consoling wishes and dreams which prevents one from seeing what is there outside one." IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 57 (1971). Censorship fosters such fantasy by blocking our access to other minds.

[145] On the relation of censorship and solipsism, see Andrew Koppelman, *Another Solipsism: Rae Langton on Sexual Fantasy*, 5 WASH. U. JURIS. REV. 163 (2013).

[146] *See generally* Koppelman, *supra* note 25.

race, or your female ones as silly trivial creatures who are of value only as sex toys, shut up. Keep that to yourself. We do not want to hear it.

Constant moral distress can create a hostile environment. Justice Ginsburg observes that the ban on sex discrimination is violated when "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"[147]—or, as she reportedly put it more pithily in oral argument, when "one sex has to put up with something that the other sex doesn't have to put up with."[148] That kind of thing happens when members of a protected class have to deal with a constant gauntlet of insinuations that they do not belong in places where they have a right to be.

V. ANTIGAY DISCRIMINATION AND MORAL DISTRESS

The tension between free speech and antidiscrimination law need not erupt into warfare, so long as the latter is construed in a way that does not expand to occupy all the cultural space.[149] Free speech does not demand transparency in every context. In some contexts, insincerity is expected and normal, and a law that demands it in those contexts does not violate the First Amendment.[150] Workplace harassment law could be deemed to be narrowly tailored to a compelling state interest. Even speech of the highest value can be excluded from a few places if the justification is urgent enough.[151] But the complaint against Chick-fil-A expands the logic of that narrow exception to the entire world. Free speech demands that there be ample opportunity to express illiberal thoughts in a way that provokes moral distress.

The Chick-fil-A case may seem fanciful. The Sweet Cakes litigation shows, however, that the pertinent tendency is not fanciful at all.

There is not much doubt that the bakery, by refusing to bake for a same-sex wedding, violated the prohibition on discrimination on the basis of sexual orientation. But the Oregon Labor Commissioner's finding of liability and

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[147] Harris v. Forklift Sys., Inc. 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

[148] This quotation appears in Linda Greenhouse, *Ginsburg at Fore in Court's Give-and-Take*, N.Y. TIMES, Oct. 14, 1993, at A1.

[149] *See* KOPPELMAN, *supra* note 25, at 220–65.

[150] Shiffrin, for whom mutual transparency is a central free speech value, agrees with this. Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 863 (2005).

[151] For example, a plurality of the Supreme Court upheld a content-based restriction on political speech—a ban on vote solicitation within 100 feet of a polling place, which the plurality deemed a "minor geographic limitation"—as necessary to compelling interests in preventing voter intimidation and election fraud. Burson v. Freeman, 504 U.S. 191, 210–11 (1992) (plurality opinion). I note again that the corresponding urgency in the context of harassment is confined to the workplace. *See supra* text accompanying notes 26–27.

the extraordinarily large damage award were crafted with no evident awareness that there was *any* free speech issue.

Here are the facts, as the Commissioner found them. AK is the baker, the lesbian couple is RBC and LBC, and CM is RBC's mother, who went with her to select the wedding cake:

> During the tasting, AK asked for the names of the bride and groom, and RBC told him there would be two brides and their names were "Rachel and Laurel." At that point, AK stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of AK's and his wife, MK's, religious convictions. In response, RBC began crying. She felt that she had humiliated her mother and was anxious whether CM was ashamed of her, in that CM had believed that being a homosexual was wrong until only a few years earlier. CM then took RBC by the arm and walked her out of Sweetcakes to their car. On the way out to their car and in the car, RBC became hysterical and kept telling CM "I'm sorry," because she felt that she had humiliated CM.
>
> In the car, CM hugged RBC and assured her they would find someone to make a wedding cake. CM drove a short distance, then returned to Sweetcakes and re-entered Sweetcakes by herself to talk to AK. During their subsequent conversation, CM told AK that she used to think like him, but her "truth had changed" as a result of having "two gay children." AK quoted Leviticus 18:22 to CM, saying "You shall not lie with a male as one lies with a female; it is an abomination." CM then left Sweetcakes and returned to the car. While CM was in Sweetcakes, RBC remained sitting in the car, "holding [her] head in her hands, just bawling."
>
> When CM returned to the car, she told RBC that AK had told her that "her children were an abomination unto God."
>
> When CM told RBC that AK had called her "an abomination," this made RBC cry even more. RBC was raised as a Southern Baptist. The denial of service in this manner made her feel as if God made a mistake when he made her and that she wasn't supposed to love or be loved, have a family, or go to heaven.
>
> CM and RBC then drove home. RBC was crying when they arrived home and immediately went upstairs to her bedroom, followed by LBC and CM, where she lay in her bed, crying. In the bedroom, LBC asked CM what had happened, and CM told her that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" at AK's statement about same-sex weddings. This upset her and made her very angry.
>
> LBC, who was raised as a Catholic, recognized AK's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination," and thought CM may have heard wrong. She took the denial of service in this manner to mean "this is a creature not created by God, not created with a soul; they are unworthy of holy love; they are not worthy of life." She immediately thought that this never would have happened if she had not asked RBC to marry her and felt shame because of it. She also

> worried that this might negatively impact CM's acceptance of RBC's sexual orientation.
>
> LBC, who had always viewed herself as RBC's protector, got into bed with RBC and tried to soothe her. RBC became even more upset and pushed LBC away. In response, LBC lost her temper and started yelling that she "could not believe this had happened" and that she could "fix" things if RBC would just let her. After LBC left the room, RBC continued crying and spent much of that evening in bed.[152]

There is much more in this vein. The Commissioner found that the discrimination was "a clear and direct statement that RBC and LBC lacked an identity worthy of being recognized," and that their reactions were "the reasonable and very real responses to not being allowed to participate in society like everyone else. The personal harm in being subjected to such separation is felt deeply and severely, as the evidence in this case indicated."[153]

Although it is hard not to feel sorry for RBC,[154] much of what upset her was constitutionally protected speech.

The Commission had also sought to give the complainants damages "for emotional suffering they experienced as a result of the media and social media attention generated by the case."[155] RBC and LBC had been subjected to vile and hateful comments on websites after the bakers publicized their case.[156] Making Sweet Cakes liable for these, on the theory that they were foreseeable, implies that a party, subjected to a law he regards as unjust, must not complain publicly about that fact on pain of further financial penalty. This was too much for the Commissioner, who held without explanation that "the facts related solely to emotional harm resulting from media attention do not adequately support an award of damages."[157]

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[152] Klein final order, *supra* note 80, at 5–7 (internal citations omitted).

[153] *Id.* at 33.

[154] Like many gay people, she also has experienced a history of humiliation and discrimination that no one should ever have to go through. *See* Nigel Jaquiss, *Bittersweet Cake*, WILLAMETTE WK. (July 21, 2015), http://www.wweek.com/portland/article-25119-bittersweet_cake.html [perma.cc/22AF-D29J].

[155] Klein final order, *supra* note 80, at 40.

> The Agency's theory of liability is that since Respondents brought the case to the media's attention and kept it there by repeatedly appearing in public to make statements deriding Complainants, it was foreseeable that this attention would negatively impact Complainants, making Respondents liable for any resultant emotional suffering experienced by Complainants. The Agency also argues that Respondents are liable for negative third party social media directed at Complainants because it was a foreseeable consequence of the media attention.

Id.

[156] For some ugly examples, see Jaquiss, *supra* note 154.

[157] Klein final order, *supra* note 80, at 40. The administrative law judge in the Klein matter had previously based the same conclusion on *Anderson v. Fisher Broadcasting Comps.* 712 P.2d 803, 804–

The amount of damages is remarkable: $135,000 for a single refusal of service.[158] Since the Commissioner recited the facts above "only to the extent necessary to provide context to Complainants' claim for damages,"[159] he must have regarded them as pertinent to that claim. The Commissioner implausibly claims that these damages "do not constitute a fine or civil penalty."[160]

Much of the emotional suffering that was the basis of the damage award was what Waldron calls "moral distress," the pain of being confronted with unwelcome moral ideas.[161] AK's quotation of Leviticus implied that RBC ought to change her entire life, to repudiate the values that made sense of that life and embrace a different set of values that were profoundly alien to her.[162] The preceding sentence describes *all* radical religious disagreement. Free speech protects the expression of such disagreement.[163] Financially penalizing someone for expressing such views

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06 (Or. 1986) (holding that truthful presentation of facts concerning a person does not give rise to common law liability for emotional distress). Proposed Findings of Fact, Melissa Elaine Klein, Nos. 44-14, 44-15, at 107 (Ore. Bur. Lab. & Indus. Apr. 21, 2015), http://www.oregon.gov/boli/SiteAssets/pages/press/Sweetcakes%20signed%20PO.pdf [perma.cc/9UZY-QUBF] [hereinafter Klein finding of fact].

[158] The amount of damages was particularly striking given that the administrative law judge had concluded that plaintiffs' testimony about their emotional suffering was almost entirely in response to questions on how they felt about the media exposure—which both the ALJ and the Commissioner had concluded were not compensable harms. *See* Klein finding of fact, *supra* note 157, at 100, 102, 108.

The effect on the defendants was blunted by a crowdfunding campaign that raised $352,000 on their behalf. *See* Valerie Richardson, *Sweet Cakes by Melissa Crowdfunder Breaks Record with $352K*, WASH. TIMES (July 14, 2015), http://www.washingtontimes.com/news/2015/jul/14/sweet-cakes-melissa-crowdfunder-breaks-record-352k/ [perma.cc/4ZGW-HWA5]. This is not a sustainable solution for other, similar cases that are likely to arise in the future.

[159] Klein final order, *supra* note 80, at 3 n.2.

[160] *Id.* at 34.

> Any damages awarded do not constitute a fine or civil penalty, which the Commissioner has no authority to impose in a case such as this. Instead, any damages fairly compensate RBC and LBC for the harm they suffered and which was proven at hearing. This is an important distinction as this order does not punish respondents for their illegal conduct but, rather makes whole those subjected to the harm their conduct caused.

Id.

[161] *See* Waldron, *supra* note 128.

[162] I also note the detail, ignored by the Commissioner, that what RBC heard—which clearly was a major cause of her emotional distress—was not what AK said. CM inaccurately reported to RBC that AK had said that RBC's children were abominations. *See supra* text accompanying note 152.

The pertinent passage from Leviticus condemns conduct, not persons, and in fact it does not even condemn lesbian sex. But even if AK had declared that RBC's children were abominations, the First Amendment protects the right to say that, just as it protects the right to say near a funeral that you are happy that the mourner's son is dead. *See* Snyder v. Phelps, 562 U.S. 443, 459–61 (2011).

[163] Carlos Ball argues that permitting merchants to announce their opposition to same-sex marriage "would compound rather than mitigate the harms at issue because it would make it known to the entire community that some of its merchants believe same-sex couples are unworthy of their services." Ball, *supra* note 66, at 17. Free speech protects the right of those merchants to make their beliefs known to

is, from the standpoint of free speech, like financially penalizing someone for saying that the mayor should not be reelected.

VI. SAVING CONSTRUCTIONS

Given the Supreme Court's vagueness about the hostile environment question, local decisionmakers have a great deal of discretion. The Oregon episode shows how that discretion can be abused. Absent some free speech constraint, it is likely to be abused a lot more.

The typical law review article on free speech law directs its recommendations to the Supreme Court. I have no illusion that they will pay any attention. Some of the very Justices who are most concerned about the impact of gay rights on religious dissenters have also crafted the most rigid rules of free speech law.[164]

These judges tend to be very speech protective. But they also have declared their categorical unwillingness to craft any new exceptions to protection, which leaves them with the choice of either getting rid of all of harassment law or just ignoring the issue (as they are in fact doing).

State courts, however, could solve the problem easily. The following argument is specifically addressed to them.

A. Constitutional Avoidance

The Supreme Court has never dealt with the constitutional issues created by hostile environment law. But it has not declared that those issues do not exist, either; it has merely acted as if that were the case.[165] In *Reed v. Town of Gilbert* it suggested that any law that penalizes speech on the basis of its content is suspect, thereby calling into question all of hostile environment law and much, much else.[166] It is hard to tell what weight to give to *Reed*, because it is hard to believe the Court is serious. A significant

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the community. Ball is responding to a proposal that such announcements would trigger a right to discriminate, but the logic of his objection is not confined to that proposal.

[164] *Compare* Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (legalization of same-sex marriage "creates serious questions about religious liberty"), *with* United States v. Stevens, 559 U.S. 460, 470 (2010) (opinion of the Court by Roberts, C.J.) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits . . . . Our Constitution forecloses any attempt to revise" the judgment that the benefits of First Amendment protections outweigh the costs "simply on the basis that some speech is not worth it."); *compare Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting) ("[T]he majority's decision threatens the religious liberty our Nation has long sought to protect."), *with* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (opinion of the Court by Thomas, J.) ("Government regulation of speech is content based," and thus subject to strict scrutiny, "if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

[165] *See supra* text accompanying notes 13–17.

[166] *See supra* text accompanying notes 31–33.

body of scholarship does see the problem. It converges on the idea that the First Amendment protects at least a subset of the speech that could be construed as creating a hostile environment.[167] There is, in short, a live First Amendment issue here.

A familiar rule of statutory construction is the avoidance canon: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[168] The Court has embraced this as a "'cardinal principle' of statutory interpretation."[169] This canon can be relied on when construing state statutes that prohibit hostile environments in public accommodations. "Forty-nine state supreme courts have stated that they apply the canon of constitutional avoidance."[170]

In order to avoid constitutional difficulties, public accommodations law should be construed so that a business is not barred from publicly announcing its moral objection to homosexuality, or from publicly supporting antigay political causes. For the same reason, officials enforcing the laws should be aware, as the Oregon Commissioner was not, of the delicate free speech issues that are raised in these cases. And they should steer clear of them as much as they can.[171]

At a minimum, a disclaimer should be deemed permissible. Grave constitutional doubts are raised by a restriction of speech, on a matter of public concern, that is not itself targeted harassment of a specific person or a threat to illegally discriminate. Public accommodation statutes that do not specifically prohibit such speech—and there is no statute that does—should not be construed to plunge into these treacherous waters.

B. Drawing the Line

Two basic principles are at work here. Businesses have the right to speak to the public about matters of public concern. Businesses may not

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[167] *See supra* note 86.

[168] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979)).

[169] Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[170] Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1949 & n.175 (2011) (providing extensive citations). Ironically, the one exception is Oregon. "Because the Oregon Supreme Court's interpretation hierarchy essentially eliminates substantive canons, that court has only used the avoidance canon once in the past seventeen years. Oregon is therefore not included in the total tally." *Id*. at 1949 n.175 (citation omitted). On the other hand, Oregon has not disavowed the canon either.

[171] I am attracted to Koontz's doctrinal formulation; *see supra* note 86 and accompanying text; but any rule that licenses these results will do.

refuse to serve gay people or engage in speech that they know will be construed as such a refusal.

An obvious place to draw the line is at the door of the business. A proprietor would be free to say what she liked away from work, but could not place these signs where the customers could see them. This, however, would not guarantee that no patron is made to feel unwelcome. The customer of Chick-fil-A did not need a sign on the premises in order to know what the owner thought. This solution would also have high free speech costs. The Supreme Court, when it struck down a ban on residential signs, observed that such signs "are an unusually cheap and convenient form of communication," which,

> [e]specially for persons of modest means or limited mobility . . . may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate.[172]

All these are equally true of small business owners.

So we must consider letting businesses speak, so long as they do not engage in constructive refusals to serve. Just where is the line between the two? Consider a borderline case, a suggestion by Russell Nieli:

> We are required by the Sexual Orientation and Gender Identity (SOGI) provision of New York State's anti-discrimination statute to make our wedding facilities available to anyone who seeks to use them, including gay and lesbian couples who want to marry under New York's same-sex marriage law. We believe strongly in the democratic process and the rule of law. For this reason, we will obey the state law governing our business. However, we obey this law only under the gravest protest, as we believe it violates our deepest moral and religious convictions. It does so needlessly and with apparent intent to polarize our country and inflame an already overheated cultural war.
>
> We are Christians, and we believe that marriage is exclusively a relationship between one man and one woman. It should not, in our view, be construed as a relationship between people of the same sex or relationships involving three or more people.
>
> We realize, however, that there are many people today who do not agree with us on these matters, and who hold their opposing views just as strongly as we hold ours. We respect the views of such people. We only ask that such people respect our own views in the same way that we respect theirs, and that, in the interest of tolerance and religious pluralism, they join us in seeking repeal of a law which requires us to violate our conscience. Those people who do not believe that marriage need be restricted to its traditional form and who

[172] City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994) (footnote and citations omitted).

> seek a venue to celebrate non-traditional marriages have access to many other catering halls in this area that would be more than happy to accommodate their wishes.
>
> Please do not ask us to violate our religious beliefs. We all must work together to accommodate our sincerely held differences in these matters. Our continued existence as a free, vibrant, tolerant and loving people surely depends upon it.[173]

The last four sentences of Nieli's announcement cross the line suggested by Koontz,[174] since they are addressed directly and specifically to same-sex couples, rather than being an announcement to the world of the owner's views. They clearly indicate that such couples are not welcome, and so are a constructive refusal to serve. They are also unnecessary. The preceding sentences make the owner's views clear.

The same effect can be achieved with a much briefer announcement. The New Mexico court[175] evidently contemplated something like this: "We oppose same-sex marriage but we comply with applicable antidiscrimination laws."

The question whether any sign is a constructive refusal to serve is a contextual one, and so does not lend itself to a formulaic solution.[176] The

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[173] Russell Nieli, *Gay Weddings and the Shopkeeper's Dilemma*, PUB. DISCOURSE (Dec. 17, 2014), http://www.thepublicdiscourse.com/2014/12/14190 [perma.cc/9H6W-K5LK]. (Thanks to Reva Siegel for the reference.) I became aware of Nieli's proposal after completing the first draft of this paper. I cheerfully acknowledge that he thought of a speech-based solution before I did.

[174] *See supra* note 86 and accompanying text.

[175] *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 59–70 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[176] The language I just described as a safe harbor on a website—"We oppose same-sex marriage but we comply with applicable antidiscrimination laws"—would be an appropriate basis for liability if the photographer came to the wedding with those words emblazoned on her shirt, because that would be a way of providing an inferior quality of service, just like a restaurant that provided food to black customers but otherwise treated them in a conspicuously insulting fashion. *See supra* note 76. Thanks to Sam Tenenbaum for the hypothetical. A similar disclaimer was deemed inadequate by the Supreme Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388–89 (1973). In that case, a newspaper ran columns of employment advertisements designated "Jobs—Male Interest" and "Jobs—Female Interest" and headed each column with the following:

> Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances, local, state, and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination.

Id. at 381 n.7. The Court responded: "It suffices to dispose of this contention by noting that the Commission's commonsense recognition that the two are connected is supported by evidence in the present record." *Id.* In that case, however, the announcement was a reliable indicator of covert, undetectable, illegal discrimination. With public accommodations, any violation of antidiscrimination law will immediately be obvious, and so the danger that the announcement would signal and abet actual, undetectable law violations is attenuated. The assumed connection is thus unsupported here. *See also* Hailes v. United Air Lines, 464 F.2d 1006, 1009 (5th Cir. 1972) (considering the issue whether defendant's behavior "inculcate[d] a reasonable belief on [plaintiff's] part that applying [for

New Mexico court, however, offers a template and should provide a safe harbor.

A different solution that requires no new legislation, in my judgment less attractive than the disclaimer just described, might be for the businesses in question to identify themselves as "Christian." The inclination of some businesses thus to identify themselves has been deferentially acknowledged by the Supreme Court.[177] Little authority addresses whether identifying as "Christian" can violate the prohibition on declaring that some customers are unwelcome, but what there is suggests that this is a legitimate form of self-identification.[178]

If conservative Christian businesses began adopting this strategy, there would obviously be some obfuscation going on, trafficking in the fact that only recently has the label "Christian" come to be understood as referring specifically to (or, at least, as the object of attempted appropriation by) Evangelicals. This use of the term would make it even more specific, referring to alienation engendered by the culture wars.[179] Identifying religion with one political faction is obviously bad for religion. It has already played a role in the dramatic reduction in the number of Americans who self-identify as Christian.[180] From the perspective of conservative Christians, the New Mexico solution should be a better answer.

CONCLUSION

In its earliest formulations, free speech was part of the practice of religious toleration. The idea of toleration has not attracted much interest on either side of the gay rights controversy. Toleration—"from the Latin *tolerare*: to put up with [or] countenance"—"refers to . . . non-interference with beliefs [or] actions . . . that one considers to be wrong."[181] It implies

employment] was a futile gesture"), cited with approval in *Pittsburgh Press*, 413 U.S. at 381 n.7. The question of what constitutes a threat—whether to discriminate or to do anything else—is inevitably context dependent. *See* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337 (2006).

[177] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2764–66 (2014).

[178] The Alaska Attorney General opined that that state's law was not violated by bed-and-breakfast advertisements referring to "Christian home" or "Christian environment," holding that these did not imply that non-Christian guests were unwelcome. Content of Advert. in State Tourist Guide, 1994 Alaska Op. Att'y Gen. (Inf.) 151 (1994), 1994 WL 178695. Less defensible was a New York court's determination that a resort's advertisement, "Serving Christian Clientele since 1911," did not indicate that non-Christians were unwelcome. Trowbridge v. Katzen, 203 N.Y.S.2d 736, 738–40 (N.Y. Sup. Ct. 1960).

[179] On this point I am indebted to conversation with Winnifred Fallers Sullivan.

[180] *See* Koppelman, *supra* note 46, at 655–57.

[181] Rainer Forst, *Toleration*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 4, 2012), http://plato.stanford.edu/entries/toleration/ [perma.cc/XA7K-9LPD].

that there is something wrong with what is tolerated. Goethe declared: "To tolerate means to insult."[182]

This condescending implication of toleration was always apparent to the gay rights movement, which therefore had no interest in it. Proponents of gay rights—I have long been one of them[183]—have argued, with growing success, that there is nothing inferior about gay people, that homosexuality is a benign variation. The same-sex marriage issue was well suited to this reversal of traditional heterosexism. Married people have sex. Society knows that they have sex. It thinks that is ok. In fact, it is more than ok; it is expected, and good. The stigma against homosexuality is tightly tied to the condemnation of homosexual sex acts. That is why the nationwide recognition of same-sex marriage[184] is such a decisive victory. It necessarily reverses this valuation. It implies that homosexual sex is good.

This same movement has developed an antidiscrimination ethic that condemned the traditional condemnation. This often comes advertised as a matter of secular rationality. Actually, it takes us into the realm of pollution and taboo. Liberal theorists are uncomfortable with the invocation of such primitive impulses, but they appear to be an ineradicable part of humanity's moral vocabulary.[185] As with racism, the stigmatization of gays is so deeply

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[182] *Id.*

[183] *See, e.g.*, KOPPELMAN, *supra* note 25, at 146–76; Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431 (2014); Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131 (2013); Andrew Koppelman, *Response: Sexual Disorientation*, 100 GEO. L.J. 1083 (2012); Andrew Koppelman, *DOMA,* Romer*, and Rationality*, 58 DRAKE L. REV. 923 (2010); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 U.C.L.A. L. REV. 519 (2001), *reprinted in* 1 THE DUKEMINIER AWARDS: BEST SEXUAL ORIENTATION LAW REVIEW ARTICLES OF 2001 at 49 (2002); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988). I also coauthored amicus briefs in *Lawrence v. Texas*, the Supreme Court case that invalidated laws against homosexual sex, and *Hollingsworth v. Perry* and *Obergefell v. Hodges*, both of which considered a right to same-sex marriage. *See* Brief of Amici Curiae Constitutional Law Professors Bruce A. Ackerman et al. in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 136139; Brief of Amici Curiae William N. Eskridge Jr. et al. in Support of Respondents, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 840011; Brief Amicus Curiae of Legal Scholars Stephen Clark et al., Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 and 14-574), 2015 WL 1048436.

[184] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[185] *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 170–77 (2012). Liberals do tend to be in denial about the importance of disgust in their moral outlook. *See* Dan Kahan, *Is Disgust "Conservative"? Not in a Liberal Society (or Likely Anywhere Else)*, CULTURAL COGNITION PROJECT (May 9, 2013, 10:20 AM), http://www.culturalcognition.net/blog/2013/5/9/is-disgust-conservative-not-in-a-liberal-society-or-likely-a.html [https://perma.cc/2X6X-BSAR].

rooted in American culture that it is probably necessary to construct this kind of counter-taboo in order to respond to it. In each case, the aim is to induce citizens to regard the relevant prejudice as itself ritually unclean. But this weapon is, if you will pardon the expression, undiscriminating. It can lead to the kind of mindless lashing out, such as treating innocent people as vile contaminants, that was a depressingly familiar part of gay life in America for so many years.[186]

Conservatives moved toward a more tolerant position over time, silently shifting away from vigorous enforcement of sodomy laws toward a position of merely insisting on the superior status of heterosexual marriage.[187] Now they have suddenly become very interested in toleration, because the status of inferior insiders[188] has suddenly been imposed on *them*. Maggie Gallagher worries that those who oppose same-sex marriage will be regarded "as hateful bigots whose beliefs must be suppressed by operation of law."[189] Justice Alito, dissenting in the Supreme Court's

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[186] See Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035 (2000) (reviewing WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999)).

[187] For example, Professor Robert P. George of Princeton University, one of the most articulate opponents of same-sex marriage, argued that sodomy prohibitions are not in principle unjust. *See* ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 108 (2001). He co-authored an amicus brief that defended the constitutionality of such laws. *See* Brief of Amicus Curiae of the Family Research Council, Inc. and Focus on the Family in Support of the Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470066. A few years later, he wrote that opposing same-sex marriage "certainly isn't about legalizing (or criminalizing) anything," for "[i]n all fifty of the United States, two men or women can have a [ceremony] . . . and share a domestic life" if they wish. ROBERT P. GEORGE, *What Marriage Is—and What It Isn't*, *in* CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 126, 130 (2013). He also increasingly focuses on the danger to religious liberty. *See* ROBERT P. GEORGE, *The Myth of a "Grand Bargain" on Marriage*, *in* CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM, *supra*, at 143; Rick Plasterer, Opinion, *Robert George Discusses Same-Sex Marriage and Its Social Consequences*, CHRISTIAN POST (June 26, 2015, 11:05 AM), http://www.christianpost.com/news/robert-george-discusses-same-sex-marriage-and-its-social-consequences-140891/#j40TzxWPIJgEGC0W.99 [perma.cc/BGT4-SJ6P]. Thanks to Steve Heyman for most of these citations.

[188] This term

> applies to persons whose divergence from some norm is considered tolerable, but who are thereby relegated to inferior social status. The archetype of this category is probably the bottom of the caste system in India: it is not morally or politically wrong to be an Untouchable—indeed, it is right and necessary that the state and the world include Untouchables—but being an Untouchable relegates one to the bottom of society.

John Eastburn Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205, 209 (1989).

[189] Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260, 269 (2010). This may be an appropriate place to note the silliness of the debate, which is taken seriously in some quarters, over whether opposition to same-sex marriage is appropriately labeled "bigotry." The label is analytically useless. Merriam-Webster defines a bigot as "a person who strongly and unfairly dislikes other people, ideas, etc.," or "a person who is obstinately or intolerantly devoted to his or her own opinions and prejudices." *Bigot*, MERRIAM-WEBSTER,

decision recognizing the right of same-sex couples to marry, feared that the Court's decision would be used "to vilify Americans who are unwilling to assent to the new orthodoxy."[190]

They are right to worry. The conservative columnist Rod Dreher describes an emerging consensus on the right "that the most important goal at this stage is not to stop gay marriage entirely but to secure as much liberty as possible for dissenting religious and social conservatives while there is still time."[191] Efforts to secure legislative relief, by enacting religious exemptions from public accommodations laws, have met with disaster.[192]

I suggest that we take a longer view. The core issue of religious toleration has been resolved in the United States, not by the religion clauses of the Constitution, but by the protection of free speech. Heresy is protected. Blasphemy is protected. Justice Holmes observed long ago that free speech means "not free thought for those who agree with us but freedom for the thought that we hate."[193]

This one is hated a lot. Discrimination has become a kind of blasphemy, declaring worthless that which most of us value. Free speech has protected blasphemers and heretics. It should offer comparable protection here.

Clear signals about merchants' views of same-sex marriage would prevent the nastiest collisions between religious conservatives and gay people. It would have been better if the stubborn proprietors of Sweet Cakes had never met the spectacularly sensitive plaintiffs in *Klein*. Those plaintiffs reacted badly to rejection, but it is hard to believe that even they would actively seek out the likes of Sweet Cakes and insist on giving them their money.[194] Weddings are expensive.

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http://www.merriam-webster.com/dictionary/bigot [perma.cc/6QRQ-UD9W]. The question then reduces to what it would have been without the "bigotry" issue, whether the arguments against same-sex marriage are persuasive.

[190] Obergefell v. Hodges, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting); *see also id.* at 2639 (Thomas, J., dissenting) (warning of "potentially ruinous consequences for religious liberty").

[191] Rod Dreher, *Does Faith = Hate?: Gay Marriage and Religious Liberty are Uneasy Bedfellows*, AM. CONSERVATIVE, Sept./Oct. 2013, at 12.

[192] *See supra* notes 49–54 and accompanying text.

[193] United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[194] After the Commissioner's order, one of the plaintiffs said that the nasty surprise was one of the primary reasons for her complaint: "Why would they not tell us in one of the emails, before ever allowing us to come into the shop and be humiliated like that?" Jaquiss, *supra* note 154. (They did not tell them because they did not know at the time that they were dealing with a same-sex couple.) Sweet Cakes did actively seek out gay rights groups after the Commissioner's order, sending ten of them cakes with "We really do love you" on them to emphasize that the bakery offered Christian love to everyone. Nicole Hensley, *Former Oregon Bakers Behind Gay Discrimination Fine Ship Cakes to Skeptical LGBT Centers: 'We Really Do Love You!'*, N.Y. DAILY NEWS (Aug. 21, 2015, 6:04 PM),

The Supreme Court has made such a mess of free speech doctrine that it is impossible to tell whether this signaling is protected. For purposes of interpreting state antidiscrimination statutes, however, the mess may not matter. The rule of avoidance of constitutional difficulties should be enough to induce state courts to construe their statutes so that they do not prohibit this kind of speech.

I, and I suspect many of you reading this (given the cultural proclivities of the professional class that reads law reviews), regard the conservative Christians' views about homosexuality as utterly wrong, worthless, and harmful.[195] It would be a better world if no one held such ideas. (Of course, they think the same about us.)

But I can think that without being indifferent to the rights of those who believe they have a duty not to facilitate same-sex marriages. I do not want to hurt those people.[196] I just want to stop them from hurting gay people.

One of the deep roots of the sexual revolution was Herbert Marcuse's suggestion in *Eros and Civilization* that we should seek to abolish "surplus-repression," repression that exceeds the needs of civilization.[197] Marcuse was thinking of sexual repression, and the ideal of sexual liberation that he articulated in 1955 has rocked our world. But the same point can be made about the repression of conservative Christians. Some repression of sexual urges is necessary for civilization. So is the repression of some kinds of religiosity. But we should minimize the surplus.

Even if *you* want to hurt them, you should notice that they have rights. One of the most robust redoubts of toleration is free speech. Here we institutionalize toleration of those we regard with horror. Opponents of same-sex marriage have the right to be treated at least as well as we treat Nazis and Communists.

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http://www.nydailynews.com/news/national/anti-gay-marriage-ore-bakers-ship-cakes-lgbt-centers-article-1.2333694 [perma.cc/66B4-65SJ]. This, too, is protected by freedom of speech.

[195] It is most harmful to the adolescents within that group who discover that they are attracted to persons of the same sex, confide in their parents, and are thrown out of the house. *See* Alex Morris, *The Forsaken: A Rising Number of Homeless Gay Teens Are Being Cast Out by Religious Families*, ROLLING STONE (Sept. 3, 2014), http://www.rollingstone.com/culture/features/the-forsaken-a-rising-number-of-homeless-gay-teens-are-being-cast-out-by-religious-families-20140903 [perma.cc/XF2W-9ZVS]. This pathology cannot be addressed by antidiscrimination law, however. It also should not be a matter of moral disagreement, because it is pathological even within the terms of the moral worldview that holds that homosexual conduct is never permissible. Almost everyone who holds that view also would agree that one has a moral duty not to initiate a chain of events that has the predictable consequence of causing a teenager to become a homeless prostitute or drug addict, which is what happens to many of these children. *Id.*

[196] Some of them are friends of mine.

[197] HERBERT MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD 35–39 (2d ed. 1966).